United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2351

To be argued by
MARGERY EVANS REIFLER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2351

UNITED STATES OF AMERICA, ex rel.
MICHAEL HILL,

Petitioner-Appellant,

-against-

VITO TERNULLO, Superintendent,
Elmira Correctional Facility,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK
DENYING A WRIT OF HABEAS CORPUS

BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE

Questions Presented

1. Was petitioner's plea of guilty to the reduced charge of robbery in the second degree constitutionally valid where such plea was freely and voluntarily entered by petitioner after consultation with counsel?

2. Did the court below properly deny the application for a writ of habeas corpus without a hearing, when the court had the full State Court record and an additional letter from appellant's trial counsel?

Statement

This is an appeal from an order of the United States District Court for the Northern District of New York, (Burke, D.J.) dated October 5, 1974 which denied petitioner's application for a writ of habeas corpus. The District Court granted leave to appeal in forma pauperis but denied a certificate of probable cause. On October 11, 1974, this Court granted a pro se application for a certificate of probable cause and assignment of counsel, assigning the Legal Aid Society, pursuant to the Criminal Justice Act.

Facts

On April 30, 1970, in the County Court, Monroe County, New York, appellant and Alonzo Dukes were each indicated under # 222 for two counts of robbery in the first degree and one count of grand larceny in the third degree. In a scond indictment, # 223, appellant and Dukes were each charged with two counts of attempted robbery in the first degree, and one count attempted grand larceny in the third degree. On that petition, appellant was also charged with attempted murder. Appellant's

counsel asked for a youth offender report, which was denied by the court.

On May 14, 1970, petitioner's assigned counsel, Gerald Dorsey asked for a pre-plea investigation, which was granted by the court. On June 29, 1970, appellant, represented by James Iannuze, Esq. of counsel to Mr. Dorsey, appeared with his co-defendant and co-defendant's counsel, before Mr. Justice Ogden. This appearance took place after plea bargaining sessions between Mr. Dorsey, the Assistant District Attorney, with the participation of the trial judge.

The Assistant District Attorney asked appellant and his co-defendant if they wished to withdraw their plea of not guilty in order to enter a plea of guilty to robbery in the second degree (Plea minutes - p. 3) to satisfy both indictments.

Appellant affirmed that he made this plea after consulting with [his] attorney and upon his advice this plea was voluntary.

When the court inquired if appellant knew that he could be sent to prison, he replied, yes. At sentencing, appellant was asked if there was an legal cause to show why judgment should not be pronounced, and he said no (plea minutes p. 7).

The court at this point said:

> "THE COURT: Michael Hill, I have talked at some length with your father and mother. They have advanced all the good qualities upon you that they know.
>
> "I have also received many letters and had many letters and had many conferences with your attorney, Mr. Dorsey. I am not deaf to the pleas of those that know you in the Town of Webster; ministers, school authorities, citizens of the Town of Webster. They have all spoken well of you. The only trouble is, they do not know what to do when you are not in their observation. They have not any idea or had no idea of the robberies that you and Dukes admitted to.
>
> "You are both intelligent personable young men, and to be involved in a series of armed robberies where shootings occurred somewhat defies reason.
>
> "You and Dukes elected to leave your respective homes and take up a life of crime. You both seventeen years old; and one of the offenses that you, Hill, are guilty of, was pistol whipping an old man in a wheelchair for no reason whatever, aside from shooting at one of htese store proprietors. If I ever saw a real case of Dr. Jekyll and Mr. Hyde, it is you and Dukes."

Neither petitioner nor his counsel moved to withdraw his guilty plea at any time during this proceeding.

Prior Proceedings

Petitioner appealed his conviction to the Appellate Division, claiming 14 errors, including the claims in the present case. His conviction was affirmed without opinion on December 2, 1971.

By petition dated October 27, 1972 petitioner instituted an application for a writ of habeas corpus claiming that he did not intellignetly and voluntarily enter his plea of guilty as 1) he was not advised of the consequences of his plea, 2) has attorney told him that he would and 3) no factual basis laid for the plea.

The District Court, by order to show cause requested the records of appellant's case and the record on appeal. The court also received a letter for Mr. Dorsey concerning the sentencing advice give to appellant:

> "... To the best of my recollection, at the time Michael Hill was sentenced, there was some confusion, on my part, concerning his sentence. It was my understanding that the sentence was from five to fifteen years. This meant that with good behavior he would be out in two-thirds of the mim-imum time, or approximately two years. As I recall, this is the way it was explained to Michael. Thereafter, as I recollect, there was a change in the law and he was required to serve the full minimum term."

Opinion of the District Court

Judge Burke after examining the transcripts of the County Court proceedings, the briefs of the respective parties in the appellate division and the letter by Gerald Dorsey held as a matter of law that there was no evidence that appellant's rights being infringed under the Constitution. The court below also held that a factual basis was laid for the plea and any mistaken advice by appellant's counsel did not rise to a constitutional issue. (See appellant's Exhibit C).

POINT I

THE DISTRICT COURT PROPERLY HELD THAT APPELLANT'S GUILTY PLEA WAS INVOLUNTARY AND THAT A FACTUAL BASIS WAS LAID FOR THE PLEA

A. Appellant's Plea was Voluntary and Intelligent

Appellant's plea of guilty was made only after his plea of not guilty at arraignment, and after several plea bargaining sessions his attorney and the assistant District Attorney, with the participation of the trial judge. As a result, he could plead guilty to a lesser charge of robbery in the second degree, in satisfaction of the two indictment. As the Assistant District Attorney stated, this plea was acceptable "because of the ages of these defendants and their background." [plea

minutes, Exhibit B, Page 3]. There is evidence on the record that appellant's attorney had made efforts to obtain youthful offender status for appellant before the plea, and had made other efforts to obtain as favorable treatment as possible for his client. There is also evidence on the record that appellant had discussed the plea with counsel before pleading guilty on June 29, 1970 [plea minutes, Page 3].

The cirucmstances are therefore quite different from those in Boykin v. Alabama, 395 U.S. 238 (1969) where the defendant pleaded guilty at arraignment three days after he was assigned counsel. The judge in that case asked no questions regarding the plea, supra at 239. Upon examining a virtually empty record, the Supreme Court held that there must be an affirmative basis in the record to show that the plea was based on an intelligent and voluntary waiver of a right to trial. However, the court did not promulgate a magic formula for determining whether the plea was intelligent and voluntary.

In Brady v. United States, 397 U.S. 742 (1970) the Supreme Court held that a plea is intelligently made when the "defendant is advised by competent counsel, is aware of the nature of the charge against him, and that he is not incompetent" supra at 756. Furthermore, "the rule that a plea must be intelligently made to be valid does not require that a plea be

vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." supra at 757.

Thus, Brady v. United States propound the considerations for a voluntary and intelligent plea. Boykin v. Alabama, only adds the element of some affirmative disclosure on the record of that plea. See Brady v. United States, 397 U.S. 742, 747 n. 4. McMann v. Richardson, 397 U.S. 759 modifies the consideration of what makes a guilty plea valid. In holding that a defendant who contends he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on a petition for a writ of habeas corpus, the court went on to state:

> "As we said in Brady v. United States, ante, at 756-757, the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? On those facts would evidence seized without a warrant be admissible? Would the trier of fact on those facts find a confession voluntary and admissible? Questions like these

> cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.
>
> "That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing. Courts continue to have serious differences among themselves on the admissibility of evidence, both with respect to the proper s andard by which the facts are to be judged and with respect to the application of that standard to particular facts. That this Court might hold a defendant's confession inadmissible in evidence, possibly by a divided vote, hardly justifies a conclusion that the defendant's attorney was incompetent or ineffective when he thought the admissibility of the confession sufficiently probable to advise a plea of guilty."

The courts in this circuit have allowed flexibility in ascertaining a waiver. United States v. Vermeulen, 436 F. 2d 72, 75 (1970). United States ex rel. Massey v. Follette, 320 F. Supp. 5 (1970)(noting that Massey was seeking to change a plea of not guilty to guilty, in holding that this court's inquiry into the plea was sufficient. New York courts also have held that the trial courts' inquiry into a plea be a matter

of flexibility:

> "It is highly doubtful that a uniform mandatory cathechism of pleading defendants should be required. . . The circumstances are too various. There are knowledgeable and criminally experienced defendants and there are those who are lacking in intellect or experience, or both. . . These are all matters best left to the discretion of the court."
> People v. Nixon, 21 N Y 2d 338, 353 (1967)

See also United States v. Gearn, 496 F. 2d 691 (5th Cir. 1974).

That case holds:

> "Under the Brady decision, a court should look to the totality of the circumstances evidenced by the record to determine whether a plea was voluntarily and intelligent made. Specific judicial incantations of constitutional rights is not the litmus test under Rule 11 or the Constitution. See McChesney v. Henderson, 482 F. 2d 1101 (5th Cir. 1973).
>
> "The supposition on which appellant bases his argument has been laid to rest by this court. In United States v. Frontero, 452 F. 2d 406 (5th Cir. 1971), Judge Wisdom stated that:
>
> "This court is, however, aware of no precedent, from the Supreme Court or elsewhere, for the proposition that due process requires that a defendant be informed of each and every right which is waived by a guilty plea or that the waiver of these rights is a 'consequence', within the meaning of Rule 11, of which a defendant must be personally informed before a guilty plea may be accepted."

In this case, upon examination of the record, it is clear that appellant intelligently and voluntarily pleaded guilty, after consultation with counsel with knowledge of the consequences.

B. Appellant's counsel mistaken evaluation of the sentence does not rise to a constitutional question

Appellant claims that he was informed by his counsel that he would receive a maximum of four years as a youthful offender. However, the record shows [minutes of April 30, p. 6, minutes of May 14, 1970, p. 2] that the trial court made it clear that it would not consider youth offender treatment.

Mr. Dorsey's letter merely states that he might have misinformed appellant of the period of time he would be imprisoned before he could be paroled. There is no mention of youthful offender treatment, nor any statement then Mr. Dorsey may have misinformed him of the maximum term of this sentence.

Assuming arguendo, that Mr. Dorsey was mistaken in the parole terms of the sentence, there is no showing that he failed to advise appellant of the maximum term of the sentence as in U.S. ex rel. Lesson v. Damon, 496 F. 2d 718 (2d Cir. 1974) nor did defense counsel promise a miminum sentence by a judge who imposed the maximum sentence, Mosher v. LaVallee, 491 F. 2d 1346 (2d Cir. 1971).

In McMann v. Richardson, 397 U.S. 759, 774, the Supreme Court has stated:

> "It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes that risk of ordinary error in either his or his attorney's assessment of the law and facts. . . he is bound by his plea and his conviction unless he can allege and prove serious derelicitions on the part of counsel sufficient to show that he plea was not after all, a knowing and intelligent act." (emphasis supplied)

Defense counsel's mistaken estimate of sentence doesn't render the plea involuntary. United States ex rel. LaFay v. Fritz, 455 F. 2d 297 cert. den. 407 U.S. 923; United States ex rel. Scott v. Mancusi, 429 F. 2d 104, 198 (2d Cir. 1970) cert. den. 402 U.S. 909 (1971); United States ex rel. Bullock v. Warden, 408 F. 2d 1326 (1330)(2d Cir. 1969 cert. den. 396 U.S. 1043 (1970).

In this regard, defense counsel's alleged mistake is not "such as to shock the conscience of the court and make the proceedings a force and mockery of justice." See United States ex rel. Scott v. Mancusi, 429 F. 2d 104; United States ex rel. Maselli v. Reincke, 383 F. 2d 129, 132 (2d Cir. 1967).

C. There was a strong factual basis for the plea

Appellant's counsel had asked for a pre-plea investigation and that request was granted. Therefore, at the time of the plea the trial court had access to much information about the crimes. Thus, the court said that appellant had pistol whipped an old man. Furthermore, the court continued to elaborate the crimes involved in the following colloquy with co-defendant Dukes' counsel.

> "MR. DAVIDSON: If the Court please, I know you are fortified with the complete report on this young man. As I have discovered he was a top student and ruined his whole life probably by this act.
>
> "I do not question that there was a concerted action possible to secure funds by which they might live in this particular action, but because of the attitude of this lad informing me of the things they did, I am quite convinced, Judge, that Alonzo Dukes did not know of the possession of a gun of the other lad. I am sure that this boy probably went out with Hill for the purpose of trying to secure money in the fashion which they did, which was absolutely stupid. Yet, I did not think that he was equipped to do what was done in order to secure some funds. I do not believe he knew that there was a gun whipping, pistol whipping. I do not think he knew of the fact that there was a shot at one of the individuals, and I ask Your Honor to be as lenient as he possibly can under the circumstances, which I know is a very very serious set of crimes which are alleged against these individuals, but I would ask Your Honor, in his discretion, that the sentence you make will be made in the fashion in which to make it in a lesser time to that lesser than the other, which is an indeterminate sentence rather a minimum one.

"THE COURT: Is there anything you wish to say, Mr. Cornelius?

"MR. CORNELIUS: The People have nothing.

"THE COURT: Alonzo Dukes, in the eyes of the law and in my eyes, you are equally guilty as Michael Hill. You two planned these robberies, and what I have said to Hill applies with equal force to you. Both of you have given no reason to those who speak for you to feel that their words of commendation are other than proper. They do not know what you are doing when you are not in their sight.

"You, with Hill, in the course of these robberies have not been indicted for three of them, three in addition to the two for which you have been indicted. You and Hill decided that you would leave your respective homes and resort to a robbery to supplement your incomes.

"You are seventeen years old, the same as Hill is. The crimes to which you plead guilty and of which you have been convicted are senseless. As Mr. Davidson has truly pointed out, engaging in a life of crime for whatever reason you did, has changed the course, the entire course of your life."

From these minutes, it is clear that the trial judge had full knowledge of the factual basis of the plea. Manley v. United States, 432 F. 2d 1241 (2d Cir. 1970); People v. Nixon, 21 N Y 2d 338; People v. Barret, 33 A D 2d 633 (4th Dept. 1969). Compare United States ex rel. Dunn v. Casscles, 494 F. 2d 397 (1974) where the defendant denied his guilt in court.

POINT II

THE COURT BELOW DID NOT ERR IN NOT HOLDING EVIDENTIARY HEARING.

The Court below had the minutes of appellant's state case from arraignment, through sentencing. It also had the benefit of the appellate briefs from appellant and the district attorney's office and a letter from appellant's trial counsel, Mr. Dorsey, these records were ample to make the decision.

> "A hearing is not required when the habeas corpus has before it a full and uncontested record of state proceedings which funishes all of the data necessary for a satisfactory determination of factual issues."
> United States ex rel. McGrath v. La Vallee, 319 F. 2d 308, 312 (2d Cir. 1963).

See also Townsend v. Sain, 372 U.S. 293 (1963).

Appellant's accusation that his counsel gave him improper information, without any factual detail is insufficient to mandate an evidentiary hearing United States ex rel. Brooks v. McMann, 408 F. 2d 823 (2d Cir. 1969); United States ex rel. Best v. Fay, 239 F. Supp. 632, 634-35 (S.D.N.Y. 1965); United States ex rel. Roldan v. Follette, 450 F. 2d 514 (2d Cir. 1971); United States ex rel. Seible v. LaVallee, 450 F. 2d 842 (2d Cir. 1971).

In this case, appellant was represented by competent counsel, and did not protest the plea.

CONCLUSION

THE ORDER DENYING PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS SHOULD BE AFFIRMED.

Dated: New York, New York
December 18, 1974

Respectfully submitted,

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